IP 01-1290-C H/S Smith v. Steinkamp
Judge David F. Hamilton   Signed on 5/22/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SMITH, SHEILA, KELLY, STEVEN, HICKS, EVELYN, BRYANT, ERIC, Plaintiffs, vs. STEINKAMP, JOHN, THE STEINKAMP LAW OFFICE, LLC, INSTANT CASH INCORPORATED D/B/A CASH-TO-GO, Defendants.	))))))))))))))	CAUSE NO. IP01-1290-C-D/S

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SHEILA SMITH, STEVEN KELLY, EVELYN HICKS, and ERIC BRYANT, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	CAUSE NO. IP 01-1290-C H/S
JOHN STEINKAMP, THE STEINKAMP LAW OFFICE LLC, and INSTANT CASH INCORPORATED d/b/a CASH-TO-GO,	)	
Defendants.	)	

ENTRY ON MOTION TO COMPEL ARBITRATION

Plaintiffs Sheila Smith, Steven Kelly, Evelyn Hicks, and Eric Bryant each borrowed money from defendant Instant Cash Inc., a company doing business as Cash-to-Go, on at least one occasion. To provide security for their short-term "payday loans," each plaintiff was required to submit a post-dated check for the amount of the loan and the applicable fees. The applications listed the loan amounts, the dates of repayment, and the annual percentage rate of interest, which typically exceeded 500% annual percentage rate. In addition to the loan agreement, each plaintiff signed a provision requiring arbitration of any disputes arising out of the agreement.

All of these plaintiffs had at least one of their checks dishonored for insufficient funds, and all were subsequently contacted by defendant John Steinkamp, an attorney, regarding their delinquent debts. Plaintiffs allege in part that the debt collection process used by the defendants violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, and the Indiana Uniform Consumer Credit Code, Ind. Code § 24-4.5-1-1. Plaintiffs further allege that the practices of the defendants violated the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, and that the methods employed by attorney Steinkamp violated Indiana Code § 33-21-1-8 pertaining to attorney deceit. Defendants, pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 2 & 3, have moved to stay this action and to compel arbitration of these claims. As explained below, defendants' motion is granted in part, but denied with respect to the claims of plaintiffs Smith and Hicks arising from loan transactions for which they did not sign a separate arbitration agreement, either at the time of the loan agreement or later.

Discussion

Cash-to-Go operates as a so-called "payday lender." To provide security for a loan, each plaintiff was required to submit a post-dated check for the principal amount of the loan plus the related fees. When a loan became due, a plaintiff could pay cash or its equivalent and have her check returned. A plaintiff could also choose to roll over the debt into a new short-term loan by paying a new fee and issuing a new post-dated check for the same amount as the first one. If the plaintiff did neither of these things, the loan became due and the lender could negotiate the plaintiff's check. If the check was dishonored for insufficient funds, the lender could take steps to collect. Each of these plaintiffs had at least one check dishonored for insufficient funds, and Cash-to-Go employed attorney Steinkamp to collect the debts.

All of the plaintiffs signed at least one arbitration agreement with Cash-to-Go providing that, with irrelevant exceptions, all disputes arising under the loan agreement would be resolved by arbitration. The arbitration agreements stated:

> 1. For purposes of this Agreement, the words "dispute" and "disputes" are given the broadest possible meaning and include, without limitation (a) all federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to the Applicant/Personal information form (the application), this Agreement (including this arbitration provision and the fees charged), or any prior agreement or agreements between you and us; (b) all counterclaims, cross-claims and third-party claims; (c) all common law claims, based upon contract, tort, fraud, and other intentional torts; (d) all claims based upon a violation of any state or

> federal constitution, statute or regulation; (e) all claims asserted by us against you, including claims for money damages to collect any sum we claim you owe us; (f) all claims asserted by you individually, as a private attorney general, as a representative and/or member of a class of persons, or in any other Representative capacity, against us and/or any of our employees, agents, officers, shareholders, directors, or affiliated entities . . . including claims for money damages and/or equitable or injunctive relief.

I. *Plaintiffs Smith and Hicks – Applying the Arbitration Agreement to Subsequent Loans*

Plaintiffs Smith and Hicks both signed loan agreements that contained arbitration agreements, Smith on July 12, 2000, and Hicks on June 9, 2000. But Smith and Hicks both paid those loans by rolling the loans over in later transactions that also form part of the basis for their claims in this case. The only other loans documented in this record are a loan to Smith on August 15, 2000, and another to Hicks on August 21, 2000. The record before the court indicates that the loan agreements for the later transactions did not include arbitration agreements. See Pl. Exs. 3 and 4.

Defendants apparently agree that the later Smith and Hicks loan agreements did not include arbitration agreements. Defendants contend instead that the arbitration agreements Smith and Hicks signed for the earlier loans were broad enough to apply to claims based on the later loans.

Under those earlier arbitration agreements, the term "dispute" is given "the broadest possible meaning" and includes "(a) all federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to the Applicant/Personal Information Form (the Application), this Agreement (including this arbitration provision and the fees charged), or any prior agreement or agreements between you and us." The term "dispute" also includes "(c) all common law claims, based upon contract, tort, fraud, and other intentional torts; (d) all claims based upon a violation of any state or federal constitution, statute or regulation," and "(f) all claims asserted by you individually, as a private attorney general, as a representative and/or member of a class of persons, or in any other Representative capacity. . . ."

The language is plainly broad enough to call for arbitration of disputes arising under any earlier agreements between the parties. See, *e.g.*, *Furgason v. McKenzie Check Advance of Indiana, Inc.*, 2001 WL 238129, at *2 (S.D. Ind. Jan. 3, 2001) (relying on similarly broad language to order arbitration of disputes arising under earlier payday loan agreements). Whether the language is broad enough to require arbitration of disputes arising under later loan agreements made without any separate arbitration provision, however, is a more difficult question.

At bottom, the question is one of contract interpretation. Parties who once agreed to arbitrate all of their future disputes can later agree not to do so. In *Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866, 871-74 (7th Cir. 1985), the Seventh Circuit affirmed a district court decision refusing to order arbitration where the documents from the parties' later transaction – the one actually in dispute – lacked any arbitration agreement, despite the presence of a broad arbitration agreement in earlier transaction documents. The court treated the issue as one of contract interpretation based on the parties' course of dealings: "The question of arbitrability ought to turn not on what the method of supersession is called, but on whether the court can infer from the whole course of dealings between the parties that they intended the arbitration clause in their initial contract to govern disputes arising out of the alleged attempt to supersede that contract." 763 F.2d at 873. The Seventh Circuit reasoned that when the plaintiff "signed a contract that seemed not to incorporate any set of terms that contained an arbitration clause, it may have intended and reasonably believed that it would not be forced to arbitrate disputes arising under the contract." *Id.* As the Seventh Circuit observed, the "Universal Agreement" containing the arbitration clause "may have been universal, but it was not eternal." *Id.* at 871. Accord, *WFC Commodities Corp. v. Linnco Futures Group, Inc.*, 1998 WL 834374 (N.D. Ill. Nov. 25, 1998) (denying motion to compel arbitration where earlier contracts required arbitration but later contracts sued upon did not).

In this case, the later loan agreements signed by Smith and Hicks – without arbitration terms – stand alone at least as a matter of law. Each is for a distinct loan. Smith's loan of $125 on August 15, 2000, was payable fourteen days later on August 29, 2000, and was written to stand alone, enforceable in court without reference to any earlier transactions. Pl. Ex. 3. Hicks' loan of $300 on August 21, 2000, was payable seven days later on August 28, 2000, and it was also written to stand alone, enforceable in court without reference to any earlier transactions.

The central question in any contract interpretation is what the parties intended, as indicated objectively by their words and actions, about the agreed subject matter. What should plaintiffs Hicks and Smith have inferred from Cash-to-Go's failure to include arbitration terms in their later agreements? Each transaction stood alone. Suppose that Hicks and Smith were seeking arbitration and defendants were opposing arbitration? It is easy to imagine, especially with form contracts prepared by Cash-to-Go, that defendants would point to the obvious difference between the two sets of documents to insist that the absence of arbitration terms was intentional and should be recognized by courts by refusing to order arbitration of disputes arising under the later agreements. Cash-to-Go was free to modify the terms of the agreement from one transaction to the next – whether in response to legal or regulatory developments or to try a different business strategy. But if Cash-to-Go wanted to ensure its ability to resolve disputes in arbitration, it had an obvious method for doing so – getting the paperwork right and including the term in each new loan agreement.

On the present record, defendants have not shown that they have a right to insist on arbitration of claims by plaintiff Smith arising from her loan transaction on August 15, 2000, or claims by plaintiff Hicks arising from her loan transaction on August 21, 2000. As for plaintiffs' remaining claims, however, defendants are entitled to arbitration, as addressed below.

II. *Attack on the Legality of the Loan Contract*

Plaintiffs contend that the fees on their loan agreements with Cash-to-Go, effective annual interest rates in excess of 500%, are illegal under Indiana law. Plaintiffs conclude that the related arbitration agreements are therefore unenforceable. The court assumes the plaintiffs' premise is correct, but the conclusion is not valid under controlling Supreme Court and Seventh Circuit law regarding the validity of arbitration agreements.

Plaintiffs rely on *Livingston v. Fast Cash USA, Inc.*, 753 N.E.2d 572 (Ind. 2001), to support their premise that the loan agreements violate Indiana law. In

Livingston, the Indiana Supreme Court determined that relatively large fees for small short-term "payday loans" were finance charges that counted toward the interest rate limits in Ind. Code § 24-4.5-3-508(2). Section 3-508(2) provides in part that "the loan finance charge, calculated according to the actuarial method, may not exceed the equivalent of . . . thirty-six percent (36%) per year on that part of the unpaid balances of the principal which is three hundred dollars ($300) or less."

Livingston stated the law in Indiana as it pertains to loans like those at issue here, but it did not affect the validity of the arbitration agreements. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) the Supreme Court rejected an argument to the effect that a challenge to the legality of a contract could defeat enforcement of the contract's arbitration provisions. The Court reasoned that "no claim is made that [plaintiff] ever intended that 'legal' issues relating to the contract be excluded from arbitration, or that it was not entirely free so to contract." The Court upheld an order granting arbitration even though the plaintiff alleged that there had been fraud in the inducement of the contract. *Id.* at 407.

The Seventh Circuit applied the reasoning of *Prima Paint* in *Sweet Dreams Unlimited v. Dial-A-Mattress Intern.*, 1 F.3d 639 (7th Cir. 1993). The Seventh

Circuit reversed a district court's denial of a motion to compel arbitration, even though the plaintiff alleged that the agreement "violated Illinois law and that [plaintiff] is, as a result, entitled to rescind it." *Id.* at 640. The appellate court found that the agreement was written broadly enough to reach "all disputes having their origin or genesis in the contract, whether or not they implicate interpretation or performance of the contract per se." *Id.* at 642.

In *Furgason v. McKenzie Check Advance of Indiana, Inc.*, No. IP 00-121-C, 2001 WL 238129 (S.D. Ind. Jan. 3, 2001), a case very similar to this one, this court enforced an arbitration agreement in a payday loan contract over the argument that the underlying loan contract was illegal. This court held that the borrower could not "avoid arbitration by arguing, or even showing, that she should win on the merits of her theory that the underlying loan agreements are illegal under state law." *Id.* at *3, citing *Prima Paint* and *Sweet Dreams Unlimited*. See also *Harter v. Iowa Grain Co.*, 220 F.3d 544, 550 (7th Cir. 2000) (although plaintiff maintained that the underlying contract was illegal, the arbitration provision was still binding so long as the arbitration clause itself "is not vitiated by fraud, or lack of consideration or assent").[1]

[1]Plaintiffs rely on decisions of the Florida District Court of Appeals that have reached the opposite conclusion regarding the enforceability of arbitration clauses in loan agreements challenged as illegal under state law. In reversing an order compelling arbitration, the Florida court stated:

(continued...)

Plaintiffs do not allege in this case that there was fraud in the inducement of the arbitration agreement. Plaintiffs challenge only the legality of the underlying contracts, and that challenge does not defeat enforcement of the arbitration agreements.

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[1](...continued)

> As a matter of law, a usury violation does not arise under an agreement. Rather it arises under state statutory law. A claim that a contract is illegal and, as in this case, criminal in nature, is not a matter which can be determined by an arbitrator. An arbitrator cannot order a party to perform an illegal act. Further, the FAA puts arbitration clauses on an equal footing with other clauses in a contract. It does not put such clauses above state law or other contractual provisions. A court's failure to first determine whether the contract violates Florida's usury laws could breathe life into a contract that not only violates state law, but also is criminal in nature, by use of an arbitration provision. This would lead to an absurd result. . . . A party who alleges and offers colorable evidence that a contract is illegal cannot be compelled to arbitrate the threshold issue of the existence of the agreement to arbitrate; only a court can make that determination. Where the facts alleged by the plaintiff are sufficient to put the making of a lawful agreement at issue, the trial court must determine the validity of the agreement before compelling a party to submit to arbitration.

Party Yards, Inc. v. Templeton, 751 So. 2d 121, 123-24 (Fla. Dist. Ct. App. 2000) (citations omitted). The Florida court followed the same reasoning to affirm denial of a motion to compel arbitration in a "payday loan" case, *Fastfunding the Company, Inc. v. Betts*, 758 So. 2d 1143 (Fla. Dist. Ct. App. 2000), based upon its holding in *Party Yards*. This reasoning is certainly respectable (three Justices adovcated a similar approach in dissent in *Prima Paint*), but it is not the approach that the Supreme Court and the Seventh Circuit have taken. This court, obviously, must follow the Supreme Court and the Seventh Circuit here, so plaintiffs' challenge to the legality of the underlying contract does not affect enforceability of the arbitration provision.

III. *Applicability of the Federal Arbitration Act*

Plaintiffs argue next that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* does not apply to the loans in question because the loans did not in fact involve interstate commerce. This argument is based on the assumption that, because the loans were intrastate, interstate commerce was not affected. This position is undermined by plaintiffs' own complaint.

Plaintiffs allege that the defendants violated the Fair Debt Collection Practices Act. To explain its exercise of the commerce clause power, Congress expressly found in the Act:

> Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

15 U.S.C. § 1692(d).

The FDCPA and RICO – the statutes that plaintiffs invoke in this case – are themselves based on Congress' interstate commerce clause power to regulate the activity in question. Plaintiffs cannot seriously contend that the loans affect interstate commerce for the purpose of their FDCPA and RICO claims and simultaneously argue that the same loans do not affect interstate commerce when trying to avoid the reach of the Federal Arbitration Act. If the court were to accept plaintiffs' argument on this point, the court would have to declare the statutes unconstitutional as applied to these transactions and dismiss the case.

IV. *Discovery Prior to Arbitration*

Plaintiffs seek to delay any arbitration by asserting a right to conduct discovery before the issue of arbitrability is decided. Plaintiffs raise three distinct arguments: (1) that a motion to compel arbitration is "treated like a summary judgment motion," *Goodman v. ESE America, Inc.*, CIV. A. 00-CV-862, 2001 U.S. Dist. Lexis 433, at *2 (E.D. Pa. Jan. 19, 2001), so that discovery is appropriate "to gather sufficient information to raise a material issue of fact," see *Patricia P. v. Board of Education*, 203 F.3d 462, 469-70 (7th Cir. 2000); (2) that because an arbitration agreement can be invalidated if the agreement is prohibitively expensive for the consumer, discovery is appropriate to determine the potential costs of arbitration; and (3) that at least one of the arbitration organizations supposedly has a pro-business bias that would deny plaintiffs an impartial forum. Plaintiffs seek discovery from the three arbitration organizations listed in the arbitration agreement to determine whether any are biased against consumers. The plaintiffs have not shown that discovery is necessary or appropriate.

A. *Discovery as to Arbitration Costs*

In *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000), the Supreme Court considered but left unresolved the issue whether high costs of arbitration could be enough to invalidate an otherwise enforceable arbitration agreement. The Court found:

> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter. As the Court of Appeals recognized, "we lack . . . information about how claimants fare under Green Tree's arbitration clause."

Id. at 90-91, quoting *Randolph v. Green Tree Fin. Corp.-Ala*., 178 F.3d 1149, 1158 (11th Cir. 1999).

Recent district court decisions have divided on the issue of discovery regarding arbitration costs. Some courts rule that discovery is not justified because (1) the initial costs are readily discernible, and (2) the principal private arbitration organizations provide safeguards that protect the consumer from incurring excessive costs. See, *e.g.*, *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 829 (S.D. Miss. 2001) (cost could be determined from arbitration documents themselves); see also *Brown v. Surety Finance Serv. Inc.*, 2000 WL 528631 (N.D.

Ill. 2000), at *3 (enforcing arbitration clause in short-term consumer loan agreement; "the safeguards provided by the AAA rules allay our concerns regarding plaintiff's ability to pay the arbitration costs associated with her claims"); *Thompson v. Illinois Title Loans, Inc.*, 2000 WL 45493, at *5 (N.D. Ill. 2000) (enforcing arbitration clause in short-term consumer loan agreement; noting that AAA rules allow party to request waiver of fees). Other courts have granted discovery, finding that the published fee schedules and safeguards did not provide enough information about the potential costs of arbitration. See *Livingston v. Associates Finance, Inc.*, 2002 WL 424352, at *3 (N.D. Ill. 2002); *Fields v. Howe*, 2002 WL 418011, at *9 (S.D. Ind. 2002) (Barker, J.).

Rule 26(b)(2) of the Federal Rules of Civil Procedure empowers district courts to limit the scope of discovery if "the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." The Seventh Circuit has instructed: "Before restricting discovery, the court should consider 'the totality of the circumstances, weighing the value of the material sought against the burden of providing it,' and taking into account society's interest in furthering 'the truthseeking function' in the particular case before the court." *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681 (7th Cir. 2002).

In this case, the parties seeking discovery have ready access to the initial costs and filing fees (which in any event must be paid in the first instance by defendants in this case, see ¶ 3 of arbitration agreements).[2] Plaintiffs' counsel has been engaged as counsel in numerous other cases in this district involving issues of the arbitrability of similar consumer credit claims. Also, there are safeguards in place to protect plaintiffs from inordinately high arbitration costs.

Under these circumstances, the court is not persuaded that plaintiffs genuinely need any discovery on the subject of arbitration costs, which are readily ascertainable by less formal methods. The court concludes that the costs of the proposed discovery will outweigh its potential benefits. The request for discovery appears to have no important purpose other than to delay arbitration. Plaintiffs' motion requesting discovery to determine the cost of arbitration is therefore denied.

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[2]Arbitration organizations generally have readily accessible fee schedules. See, *e.g.* American Arbitration Association Rules/Procedures, *available at* http://www.adr.org.

B. *Alleged Bias*

Plaintiffs contend that the National Arbitration Forum (NAF) is biased against consumers. NAF is one of the three organizations listed in the arbitration agreement as a suitable forum to resolve any issues that may arise between the parties. The agreement states in relevant part:

> 2. [Y]ou shall have the right to select any of the following arbitration organizations to administer arbitration: the American Arbitration Association . . ., J.A.M.S./Endispute . . . or National Arbitration Forum . . .. However, the parties may agree to select a local arbitrator who is an attorney, retired judge, or arbitrator registered and in good standing with an arbitration association and arbitrate pursuant to such arbitrator's rules.

The Supreme Court, in *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), required arbitration to proceed even though there was concern about bias inherent in "arbitrators chosen from the business community." *Id.* at 632. The Court "reject[ed] the proposition that an arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct" and "decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Id.* at 634.

District courts in the Seventh Circuit have addressed the issue of bias in at least two cases. In *Livingston v. Associates Finance*, 2001 WL 709465 (N.D. Ill. June 25, 2001), report and recommendation approved by *Livingston v. Associates Finance*, 2002 WL 424352 (N.D. Ill. March 6, 2002), Magistrate Judge Keys did not recommend that plaintiffs be allowed discovery with respect to potential bias on the part of the arbitrators. Plaintiffs in *Livingston* alleged bias on the part of the American Arbitration Association. Judge Keys distinguished *Toppings v. Meritech Mortgage Services, Inc.*, 2001 WL 408990 (S.D. W. Va. Apr. 23, 2001), stating:

> [T]he arbitral forum [in *Toppings*] was the National Arbitration Forum ("NAF") and not the AAA. The *Toppings* court noted the plaintiffs' assertions that the NAF was "a creditor-friendly arbitrator organization" whose directors "are former employees of lending institutions and members of the defense bar that have specialized in representing lenders in litigation against consumers." 2001 WL 408990. The *Toppings* court also noted the plaintiffs' assertion regarding the way NAF marketed its services. *Id.* Therefore, the *Toppings* court allowed discovery into possible bias of the NAF forum. Here, however, the AAA has taken precautions against such bias, such as publishing *The Code of Ethics for Arbitrators in Commercial Disputes*.

Livingston, 2001 WL 709465, at *3.

Another case denying a discovery request to determine bias, *Fields v. Howe*, 2002 WL 418011 (S.D. Ind. March 14, 2002), presents an issue almost identical to this one. In *Fields*, the arbitration agreement provided for more than one arbitration organization, and the party asserting bias had the option not to use the organization she suspected of bias. Under those circumstances, Judge Barker found, there was no need for plaintiff to explore potential bias on the part of an organization that plaintiff could veto as an arbitrator. *Id.* at *8.

Similarly here, the plaintiffs allege bias on the part of the National Arbitration Forum, but plaintiffs may choose either the American Arbitration Association, an organization identified as taking precautions against bias in *Livingston,* or JAMS / Endispute, an organization, as in *Fields*, that plaintiffs have not included in their allegations of bias, to arbitrate any issues arising from the contract. Thus, even assuming that plaintiffs' assertions of bias on the part of NAF are well-founded, there is no need for discovery on the subject in this case. Plaintiffs can simply choose either AAA or JAMS / Endispute as the arbitration organization.

Conclusion

Accordingly, defendants' motion to compel arbitration is granted in part and denied in part. This action is stayed pending arbitration with respect to all claims except those of plaintiffs Smith and Hicks arising from their August 2000 loans for which no arbitration agreement was signed, and the action may proceed on those claims.

So ordered.

Date: May 22, 2002

DAVID F. HAMILTON, JUDGE
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